BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BRENT L. BERRY)

For Appellant: Brent L. Berry, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Joseph W. Kegler
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Brent L. Berry for refund of personal income tax in the amount of $728.87 for the year 1967.

The issue presented is whether appellant was a resident of California throughout the year in question.

Appellant resided in California continuously from 1941 through July 1967, with the exception of a tour of duty in the Army from 1958 to 1961, and he obtained his education in California schools. During the part of 1967 that he was physically present in California, appellant lived at his parents' home in Cupertino, California. In 1967 appellant owned an automobile which was registered in California, possessed a California driver's license, and maintained a bank account with a bank in Cupertino.

Appellant is a professional football player. In July of 1967, his contract with the Los Angeles Rams was sold to the Edmonton Eskimo Football Club of Edmonton, Alberta, Canada. Sometime during that month appellant

left California for Canada, presumably to begin training camp for the coming football season. On August 21, 1967, appellant returned to his parents' home in Cupertino to recuperate from knee surgery. Appellant went back to Canada on September 18 and remained there until the end of the Canadian football season. On November 14 he returned to Cupertino, where he stayed for the rest of the year.

While he was in Canada, appellant lived in an apartment-hotel on a month-to-month basis. He opened a bank account in Edmonton in July and maintained it until November, when he returned to California. Even while he was in Canada, however, appellant retained his account with the bank in Cupertino. Having left his own car in California, appellant leased a car in Canada and used his California driver's license. He did not apply for a Canadian driver's license.

All of appellant's earnings for 1967 came from his Canadian employment as a professional football player. Appellant paid Canadian income tax on these earnings and, because of the resulting foreign tax credit under section 901 of the Internal Revenue Code, appellant did not have any federal income tax liability for 1967. Originally, appellant reported his Canadian income on a resident California income tax return for 1967. Subsequently, he filed a nonresident return excluding his Canadian earnings and claimed a refund of the tax previously paid on the resident return.

From the foregoing facts, there is no doubt that appellant was domiciled in California at the time he left for Canada. We also believe that he remained a California domiciliary while in Canada because, as appellant reported on one of respondent's questionnaires, he intended to reside in California upon the termination of his Canadian employment. And appellant did in fact return to California as soon as the Canadian football season was over in November of 1967. We conclude, therefore, that appellant was domiciled in California during all of 1967.

Revenue and Taxation Code section 17014 defines the term "resident" for income tax purposes. Section 17014, subdivision (b), provides that the term includes "[e]very individual domiciled in this State who is outside the State for a temporary or transitory purpose." Having already concluded that appellant was domiciled in California, we need only determine whether his stay in Canada was for a temporary or transitory purpose.

The undisputed facts leave little doubt that appellant was in Canada for a temporary or transitory purpose. His employment required him to be outside California only for the football season, lasting at the most five months a year. In 1967 appellant was in Canada about three months in all, during which appellant rented temporary living quarters, leased a car, and opened a bank account which he closed when he returned to California. When added to the facts that appellant left his own car in California and kept a bank account here, these factors demonstrate the temporary nature of appellant's absence from California during 1967. In many respects this case parallels the Appeal of Harry A. and Audrey Cheyney, Cal. St. Bd. of Equal., decided Dec. 13, 1961, where we held that the Cheyneys remained California residents while out of the country to perform particular short-term job assignments which were of longer duration than appellant's sojourn in Canada.

Appellant has suggested several reasons why he should not be taxed as a California resident. One reason given is that he paid Canadian income tax on his Canadian earnings. There is, however, nothing unfair or unusual about that. A taxpayer will often be liable to one jurisdiction for taxes on income he earns there, while remaining taxable on all of his income, wherever earned, in another jurisdiction where he is a resident. In order to avoid double taxation, the state of residence frequently will allow its residents a credit for income taxes paid to another state. Although California does not give a credit for taxes paid to foreign countries, appellant did receive a foreign tax credit which completely eliminated any federal income tax liability for 1967.

As a second factor in his favor appellant points to two other absences from California during 1967. In January he spent several weeks vacationing in Mexico, and in April and May he vacationed for five or six weeks in Hawaii. These trips were obviously of a temporary nature and, since they bore no connection to appellant's work in Canada, they add nothing to his claim that his stay in Canada was for other than a temporary or transitory purpose.

Thirdly, appellant says that his contract with the Edmonton football club was good until 1969. Frobably this was the result of a standard option clause in the contract which would entitle the club to appellant's services for the 1968 season even if appellant did not sign a new contract for that season. In any

event this does not strengthen appellant's case because his contract would not require him to be away from California except for the five months of the football season each year.

Finally, appellant emphasizes the facts that he paid no federal income tax in 1967 and that the federal government would not allow him to use his foreign income for purposes of income averaging in 1967. He suggests that if California taxes him as a resident, the federal government was wrong to deny him the use of income averaging. Aside from the fact that it is clearly beyond our power to change what the federal government has done, we do not see any connection between the federal action and appellant's status as a California resident, nor do we see how income averaging could have benefited appellant in this case. Income averaging is a method which may be used to reduce one's tax liability in a year of greatly increased taxable income, but appellant's federal tax liability had already been reduced to zero in 1967 because of his foreign tax credit. Consequently, there was no liability which could be reduced by means of income averaging.

Under all of the facts we think that respondent acted properly. in denying appellant's claim for refund.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Brent L. Berry

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Brent L. Berry for refund of personal income tax in the amount of $728.87 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 22nd day of March , 1971, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary